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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 74-790

HERMAN SCHMITT,
Petitioner,

-vs-

STATE OF INDIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Supreme Court of Indiana is reported in Schmitt v. State, (1974) ___Ind.App.___, 310 N.E.2d 73, and is correctly reproduced in the

appendix to the petition.

JURISDICTION

Petitioner claims jurisdiction in this Court under Title 28, United States Code, Section 1253, which reads:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Since Petitioner seeks a review of a decision of the Court of Appeals of Indiana affirming his conviction by the Hamilton Superior Court, Respondent respectfully submits that he has failed to show jurisdiction in this Court.

QUESTIONS PRESENTED

1. Whether the trial court denied Petitioner due process of law by admitting in evidence testimony concerning other criminal activities of Petitioner prior to the transaction for which he was arrested.

2. Whether the verdict of the jury was sustained by sufficient evidence as to the sale of L.S.D..

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is Section 1 of Article XIV of the Amendments to the Constitution of the United States, which reads as follows:

"1. All persons born or naturalized in the United States, and

subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Indiana Code 1971, Sections 16-6-8-2(h) and 16-6-8-3(a), which read:

"16-6-8-2. Definitions.—As used in this chapter [16-6-8-1 - 16-6-8-11], unless the context otherwise requires:

* * *

"(h) 'Sale' means any and every sale and includes (1) manufacturing, harvesting, processing, transporting, handling, packing or any other production, preparation or putting up; (2) exposure, offer on any other proffer. Whether

or not the offeror has the present ability or capability to complete said transaction by delivering dangerous drugs; (3) holding, storing, or any other possession; (4) dispensing, giving, delivering or any other supplying, and (5) applying, administering or any other using.

* * *

"16-6-8-3 Acts Prohibited.— The following acts, the failure to act as hereinafter set forth, and the causing of any such act or failure are hereby declared unlawful except as provided in IC 1971, 16-6-8-4:

"(a) The sale of any dangerous drug or the sale of any prescribed drug unless:

"(1) such prescribed drug or dangerous drug is sold by a pharmacist upon an original prescription, and there is affixed to the immediate container in which such drug is delivered to a label bearing (a) the name and address of the establishment from which such drug was sold, (b) the date on which the

prescription for such drug was filled; (c) the number of such prescription as filed in the prescription files of the pharmacist who filled such prescription; (d) the name of the practitioner who prescribed such drug, (3) the name of the patient, if such drugs were prescribed for an animal, a statement of the species of the animal, and (f) the directions for the use of the drug as contained in the prescription; or

"(2) such dangerous drug is delivered by a practitioner in good faith in the course of his practice and the immediate container in which such drug is delivered bears a label on which appears the directions for the use of such drug; the name and address of such practitioner; the name of the patient; and, if such drug is prescribed for an animal, a statement of the species of the animal. Provided, nothing in this paragraph shall prohibit a practitioner from delivering professional samples of dangerous drugs in their original containers in the course of his practice when oral directions for use are given at the time of such delivery." [Emphasis added].

STATEMENT OF THE CASE

Diane Stiltz had been dating the Petitioner, Herman Schmitt (Tr.p. 229). She called Schmitt (Tr.p.123) and her brother, Roy Couts, talked to Schmitt by telephone about some L.S.D., because the night before Schmitt had apparently given some to Diane (Tr. p.118). Couts had notified the police of the overdose (Tr.p.298). Schmitt promised to call back that afternoon (Tr.p.119). He did call back, saying, "This is Chuck." Couts recognized his voice as the same one that called that morning (Tr.p.120). The police were present at the time of this call (Tr.p.302). At this time, Couts

agreed to meet with Schmitt to buy some L.S.D. (Tr. p.124).

In the meantime, Couts had called Officer Crose, who was present during the second conversation (Tr. p. 123). Couts and Schmitt finally met at 11:00 o'clock that evening at Diane's home, where the sale was made (Tr. pp. 124-126). With Couts was Terry Jansen and Schmitt also offered to sell some L.S.D. to him (Tr. p. 211). Jansen said he had to get some money (Tr. p. 215). He saw the package of drugs and saw money change hands between Couts and Schmitt (Tr. p. 212). Schmitt gave Jansen one pill, which he turned over to the police when he pretended to go out to get

some money (Tr.p.216).

Schmitt finally left Diane's home, where he sold the drugs, about midnight. Couts then immediately went to the police station and turned the pills over to Officer Dolen in the same cellophane package in which he had received them (Tr.p.133).

Officer Dolen verified the receipt of the drugs from both Jansen (Tr.p. 268) and Couts (Tr.p.277). He had been in the house on February 28, investigating a reported drug overdose, the victim of which proved to be Diane Stiltz (Tr.p.285).

Officer Crose had given Couts three five-dollar bills and recorded the

serial numbers so that Couts could pay the agreed price of the L.S.D. to Schmitt.

Defendant injected into the trial the issue of entrapment, to counter which, the State introduced evidence of his reputed trafficking in drugs as shown in statements made to the police, thereby showing probable cause to suspect Schmitt of such trafficking and the reason for their supplying Couts with money to make a purchase of L.S.D from Petitioner. At the close of the State's case, Petitioner moved for a directed verdict, which motion was overruled and one of his grounds alleged in his Motion to Correct

Errors was:

> "10. The Court erred in not sustaining defendant's motion for dismissal for the reason of entrapment."

However, Petitioner abandoned that alleged error in his appeal to the Supreme Court of Indiana.

SUMMARY OF THE ARGUMENT

I. This Court does not have jurisdiction of Petitioner's petition herein because:

1. The statute under which Petitioner attempts to claim jurisdiction of this Court to issue the requested writ is not applicable to a petition to review a decision of a state court.

2. Defendant failed to raise the

question of violation of the Constitution of the United States in the Court of Appeals of Indiana.

II. The trial court did not deny Petitioner due process of law by admitting in evidence testimony concerning other criminal activities of Petitioner prior to the transaction for which he was arrested because:

1. Petitioner made probable cause an issue by raising the defense of entrapment.

2. Petitioner did not make valid objections in the trial court to the admission of such testimony.

III. The verdict of the jury was sustained by sufficient evidence as to the sale of L.S.D. because:

1. The statute under which Petitioner was prosecuted did not require delivery of the drug for violation.

2. The sale of L.S.D. was complete upon Petitioner's offer to sell L.S.D. to Couts and Couts' acceptance of that offer regardless of whether Petitioner thereafter delivered or even could deliver L.S.D. in consummation of such sale.

ARGUMENT

I.

THIS COURT DOES NOT HAVE JURISDICTION OF PETITIONER'S PETITION HEREIN

The Petition for Writ of Certiorari filed herein is too defective to invoke the jurisdiction of this Court

It fails to comply with Rule 23(5)

of the Rules of this Court in that (1) the jurisdictional statement on page 2 of the Petition fails to set out "the date of the judgment or decree sought to be reviewed, and the time of its entry," as required by subparagraph (i) of said rule and (2) said jurisdictional statement states that, "It is believed that jurisdiction is conferred on this Court by Title 28, United States Code Section 1253." Title 28, United States Code, Section 1253, which is quoted herein under the heading of "Jurisdiction," confers jurisdiction only of appeals from orders of three-judge United States District Courts granting or denying

an interlocutory or permanent injunction in a civil case. While there are statutes under which the jurisdiction of this Court might be invoked, Petitioner has not brought his case under such statutes.

Jurisdiction is lacking for the further reason that no federal question was decided in the state court as provided in Rule A 12(a) of the rules of this Court. There was at no time a federal question before the Court of Appeals of Indiana for decision. Neither the Motion to Correct Errors filed in the Hamilton Superior Court (Tr. pp. 8-35) nor Petitioner's brief filed in the Indiana Court of Appeals

mentions the Fourteenth Amendment to the Constitution of the United States or any other federal constitutional or statutory provision. Therefore, since no federal question was before the Court of Appeals of Indiana, it could not decide a federal question.

In arguing the merits of the Petition in Propositions II and III, following, the Respondent does not waive the question of jurisdiction argued in this proposition, but presents Propositions II and III arguendo only

II

THE TRIAL COURT DID NOT DENY PETITIONER DUE PROCESS OF LAW BY ADMITTING IN EVIDENCE TESTIMONY CONCERNING OTHER CRIMINAL ACTIVITIES OF PETITIONER TO THE TRANSACTION FOR WHICH HE WAS ARRESTED.

In his cross-examination of Roy Couts (Tr.pp.136-182) Petitioner questioned him in fine detail concerning his relationship with the police and the Court of Appeals of Indiana interpreted this as an attempt to show entrapment, being encouraged in such interpretation by the following specification in Petitioner's Motion to Correct Errors filed in the Hamilton Superior Court.

> "10. The Court erred in not sustaining defendant's motion for dismissal for the reason of entrapment."

Although this issue was abandoned on appeal to the Supreme Court of Indiana, that court held that the attempt to show entrapment in Petitioner's cross

examination of Roy Couts opened the door for the State to show probable cause to suspect Petitioner of selling narcotics by evidence of reported previous sales. Reasonable grounds to believe that Petitioner was ready and willing to sell narcotics or dangerous drugs were proper to show as a refutation of the defense claim of entrapment. U.S. v Fox (Ind. 1971), 437 Fed.2d 733, certiorari denied Gill v. U.S., 402 U.S. 1011, 91 S.Ct. 2198, 29 L.Ed.2d 434.

Any alleged error in the admission of such evidence was not properly preserved by Petitioner because of his failure to make the proper objection in the trial court. Petitioner has

referred to only one instance of such evidence in his Petition and, thereby waived all others. That one instance is set out on page 3 of his Petition and his objection appears there as follows:

> "The defendant moves to have that stricken and objects for the same reason immaterial."

In making that objection, Petitioner waived all other grounds of objection He cannot now, for the first time, argue that that question and answer deprived him of due process of law. U.S. V. Burrell (1963), 324 Fed.2d 115, certiorari denied 376 U S. 937, 84 S.Ct. 791, 11 L.Ed 2d 675, and 376 U.S. 937, 84 S Ct. 795, 11 L.Ed 2d 658.

II.

THE VERDICT OF THE JURY WAS SUSTAINED BY SUFFICIENT EVIDENCE AS TO THE SALE OF L.S.D..

Petitioner argues briefly on page 4 of his Petition, without offering any authority, that the State failed to prove that what he sold was L.S.D.. He was convicted of violating the Indiana Dangerous Drug Act [Indiana Code 1971 §§16-6-8-1 - 16-6-8-11], more particularly §16-6-8-3(a) of said act, which prohibits unlawful sale of drugs defined in §16-6-8-1(j) of the act as dangerous drugs. Section 16-6-8-2(h) of the act defines sale to include the offer for sale "whether or not the offeror has the present ability or capability to complete said transac-

tion by delivering dangerous drugs."

In civil law, an offer to sell, when accepted by the buyer, makes a valid sale, even though the seller does not possess the article he sells. On the stock market, such a sale is called "selling short." The prohibition by the statute of even the offer to sell, regardless of whether the seller can or does complete the sale by delivery was within the power of the legislature and valid reasons for it are easy to conceive. The sale of harmless substitutes for dangerous drugs to one who believes them to be dangerous drugs may easily have a placebo effect upon the buyer and, by their

very harmlessness, encourage the buyer to make future purchases and so become an addict, while the sale of the genuine article might, by its deleterious effect, cause him to "swear off" and quit before actually forming a drug habit. The fact that the seller breaches his contract of sale by substituting some harmless substance is no defense.

The State of Indiana has construed this Indiana statute to the extent that, in Pryor v. State, (1973) ___ Ind.App.___, 291 N.E.2d 370,372,34 Ind.Dec. 629, 633, a case in which to be selling, the Court of Appeals of Indiana said:

"There is no doubt that the

> transaction of a sale, as defined by IC 16-6-8-2(h)(2), Ind.Ann.Stat. §35-3332(h)(2) [Burns 1972] is somewhat different from a sale as it is traditionally regarded in a normal commercial usage. It is our observation that the addition of the words '...whether or not complete said transaction...' makes an offer to sell the criminal act without regard to whether or not consummation of the sale by delivery of a dangerous drug is actually intended.
>
> "When the transaction is measured against the previously quoted definition of a sale, we feel that whether or not the material delivered is, in fact, a dangerous drug matters not under the facts of the case."

On petition to transfer, the Supreme Court of Indiana, in Pryor v. State, (1973) ___Ind.___, 296 N.E.2d 125, 36 Ind Dec. 484, reversed the conviction because of lack of evidence that Pryor had made an offer, but

said concerning IC 16-6-8-2(h):

> "* * * A literal interpretation of that definition would mean that the statute is violated when the offer is made, subsequent events notwithstanding.
>
> "* * * In passing, we simply observe that the failure to make any delivery would not be decisive of whether an offer was made in violation of the statute."

In the instant case, the Court of Appeals of Indiana, in discussing Pryor, supra, said in part:

> "* * * The court declined to say what its holding would have been had the evidence been sufficient to sustain a finding that Keith Pryor made or participated in the making of the offer to sell marijuana. But its failure to expressly disapprove of our First District's conclusions of law based on such a finding cannot be lightly ignored. We, therefore, feel constrained to hold that the literal interpretation of the definition in IC 1971, 16-6-8-2(h) (Burns

Code Ed., 1974) is the law until we are told otherwise."

By its denial of Petitioner's petition to transfer, the Supreme Court of Indiana has endorsed the above views of the Court of Appeals of Indiana.

Having been convicted under the applicable state statute as interpretated by the Indiana Supreme Court, Petitioner has not been denied due process of law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Petitioner's petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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